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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

WESTERN WALL SYSTEMS, LLC,

Employer,

and

OPERATIVE PLASTERERS AND
CEMENT MASONS, LOCAL 797,

Petitioner.

Case No. 28-RC-247464

**OPPOSITION TO EMPLOYER'S REQUEST FOR REVIEW OF REGIONAL
DIRECTOR OF REGION 27'S DECISION ON OBJECTIONS TO ELECTION**

Pursuant to 29 CFR § 102.67(f), the Petitioner, Operative Plasterers and Cement Masons, Local 797 ("Union" or "Petitioner"), hereby opposes the Employer's Western Wall Systems, LLC ("Employer" or "Western Wall") Request For Review of Regional Director of Region 27's Decision on Objections to Election.

I. INTRODUCTION

The Employer stipulated to the election timelines and procedures. It knew where the workers were located and demanded mail-in ballots for out-of-state workers. As such, the Employer had the unfettered ability to tell each worker about the importance of voting in the

election and the importance of following voting instructions: “A party ... shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.” 29 CFR § 102.67(k). The Union’s right to respond to Employer’s Request for Review is found in 29 CFR § 102.67(f), which provides that, “Any party may, within 7 days after the last day on which the request for review must be filed, file with the Board a statement in opposition which shall be served in accordance with the requirements of paragraph (i) of this section. The Board may grant or deny the request for review without awaiting a statement in opposition.” The Union is filing this Opposition within the seven (7) days required by the rule.

The grounds for review, as follows:

The Board will grant a request for review **only where compelling reasons exist** therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds: (1) That a substantial question of law or policy is raised because of: (i) The absence of; or (ii) A departure from, officially reported Board precedent. (2) That the Regional Director’s decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party. (3) That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error. (4) That there are compelling reasons for reconsideration of an important Board rule or policy.

29 CFR § 102.67(d) (emphasis added). Though the Employer has raised nos. (2) and (4) as grounds for review, there are no compelling reasons to review the Decision and a request for review is not warranted in this case as confirmed by Regional Director Paula Sawyer of Region 27 (“Director Sawyer”).

II. RESPONSE TO STATEMENT OF FACTS

Three factual statements by the Employer are clearly objectionable.

A. **Statement:** “Despite the parties’ earlier agreement to hold the election the first week of October 2019, they were forced to agree to hold the election by September 27, 2019.”

Objection: The Union does not agree that it was “forced” to hold an election starting on September 27, 2019. In its Petition, the Union proposed the election be held from 9/24 to 10/1. See Decision on Objections and Certification of Representative (“Decision”), p. 3 fn 5. However, at the Representative Hearing on September 10, 2019, the Union agreed to hold the election the first week of October as part of the negotiation process and in an attempt to compromise with the Employer. Therefore, the Union did not object and does not object to the election start date of September 27, 2019, which lasted for a subsequent two (2) weeks, including the first and second week of October. A mere three (3) days separate September 27, which was a Friday and October 1, which was a Tuesday. The Employer actually received more time to prepare for the election than the Union had originally requested.

B. **Statement:** “As it would have been discovered at a hearing, the individuals in Spokane mailed their ballots the same day they received them in the mail, yet there were unable to return them in time. San Diego voters equally felt rushed when they received their ballots.”

Objection: These are conclusory statements with no evidence in the Offer of Proof to support them. Indeed, the Decision states, “The investigation disclosed that the mail ballot kits had been sent on September 27 to seven employees” (p. 4). Thus, the evidence shows that the ballots were mailed on September 27th leaving ample time for the individuals receiving them to vote and return them.

C. **Statement:** “The five mail-in ballots that were not counted were a determinative number of ballots and could have changed the results of the election.” The Employer has offered no proof regarding how these individuals voted so this statement is mere speculation.

The Union adds the following pertinent facts to the Statement of Facts:

On October 21, 2019, after learning the results of the election in favor of the Union, Employer submitted a 2 ½ page document entitled “Employer’s Objection to Election” (“Objection”) to the Board, Region 28, requesting that the election be set aside and a new election conducted. On November 18, 2019, Director Sawyer issued her Decision denying the Employer’s request in its entirety. On December 2, 2019, the Employer submitted its Request for Review of Regional Director of Region 27’s Decision on Objections to Election (“Request for Review”), requesting that the Board reverse the Decision made by Regional Director Sawyer and a new election conducted. Employer objects to this Request for Review, for the reasons stated below.

III. THERE ARE NO GROUNDS FOR REVIEW

A. The Regional Director’s Decision Is Not Erroneous or Prejudicial.

1. The Employer Relied on Speculation as Confirmed by Director Sawyer.

The point of all the reported cases challenging elections seems to be whether significant unfairness occurred that affected the outcome of the election. *See, e.g., California Cartage Co.*, 2019 WL 4271853 (Sept. 9, 2019) (objectionable conduct interfered with fair election and warranted setting aside the election). The unfairness alleged in this case by the Employer is based on speculation, at most, as Director Sawyer points out in the Decision, “I have determined that the evidence as described in the Employer’s offer of proof would not be grounds for setting aside the election” (pg. 2), and the objections certainly do not prove that the outcome of the election was affected in any way. 29 CFR § 102.69(c)(1)(i) clearly allows a Regional Director to make a decision without a hearing, “if the Regional Director determines that the evidence described in the accompanying offer of proof would not constitute grounds for setting aside the election introduced at a hearing, and the Regional Director determines that any determinative

challenges do not raise substantial and material factual issues, the Regional Director shall issue a decision disposing of the objections and determinative challenges.”

In fact, the Employer’s Offer of Proof fails to comply with Section 11226 of the NLRB Casehandling Manual.

Offers of proof are often utilized as tools to focus and define issues and provide a foundation to accept or exclude evidence. The offer, in essence, is a statement that, if the named witness were permitted to testify on the matter at issue, he/she would testify to specified facts. **The facts should be set forth in detail; an offer in summary form or consisting of conclusions is insufficient.** An offer of proof may take the form of an oral statement on the record, a written statement to be included in the record (copies and service as with motions, Sec. 11225) or in the unusual situation, with permission of the hearing officer, specific questions of and answers by the witness. The latter often lengthens the record unnecessarily and should be avoided.

NLRB Casehandling Manual, Part 2, Representation Proceedings (January 2017) (“NLRB Manual”) (emphasis added).

Director Sawyer was clearly following the instructions outlined in the NLRB Manual when she stated in the Decision that “the offer of proof does not specify any conduct by the Board agent or the Region that would have compelled the parties to agree to September 27” (p. 3), “Nor does the offer of proof provide any details concerning any inability to educate the voters about the election” (p. 3) and “the offer of proof does not assert that employees would be called to testify that they were actually unable to contact the Resident Office” (p. 5). The Employer’s first footnote is another example of unsubstantiated speculation when the attorney states that they have had previous summaries granted under similar facts.

Further, in many numerous instances Director Sawyer points to the record repeatedly to substantiate her Decision, as follows: “Either party could have refused to agree to the election

details and proceeded to a hearing” (p. 3), “In its petition, the Petitioner proposed a manual election be held ‘9/24 to 10/1’” (p. 3 fn 5), “The investigation disclosed that the mail ballot kits had been sent on September 27 to seven employees” (p. 4), “Even if it were subsequently determined that the offer of proof for these objections were not deficient, there is no assertion that more than one employee was told to call the Phoenix office or that the conduct reoccurred” (p. 5), “and noting the fact that ballots were received from California in a timely manner, the two-week period provided a sufficient opportunity to vote” (p. 6), “some who were sent duplicate voting kits, were able to return their ballots in a timely manner” (p. 7), and “the instructions to sign the ballot return envelopes was provided to the voters in Spanish in two documents” (p. 8).

2. Regional Director Sawyer Adequately Considered the Voting Process.

Employer objects that the mail ballot failed to work because most if not all “voters by mail” did not receive ballots “by the final day they could request new ballots.” Also, one voter called the Board and was told to call Phoenix, but was never given the Board's number in Phoenix. Employer alleges that this is proof that the timeline set by the Board was too short. However, the Employer has offered no proof that any eligible voter was unable to vote as a result of the timeline adopted by the Board. Further, the Employer also says that this “may have had a chilling effect” on those who desired to vote by mail, but this language alone (“MAY HAVE”) is proof enough that all the Employer is offering is Speculation, as pointed out by Director Sawyer.

Employer also alleges that the mail ballots did not effectively communicate the requirements of a valid ballot to the bilingual bargaining unit. The proof offered by the Employer is that, “Of the three ballots that were successfully delivered on time, all three were void due to a missing signature on the back of an envelope.” However, the Employer does not say whether

any other ballots returned by Spanish speakers (likely too late to be counted) did have a signature on the back of an envelope or whether the ballots that were not signed were in fact from Spanish speakers. Further, this is not proof that there was anything wrong with the ballot. Speaking objectively, the instructions plainly state: "FIRME LA PARTE DE ATRAS DEL SOBRE AMARILLO DE VUELTA EN EL ESPACIO PROVISTO." This could hardly be clearer, in that these instructions in Spanish can only be read as follows, "Sign the back side of the yellow envelope in the space provided."

Furthermore, there were only three void ballots (the ones that lacked signatures) and even if these three (3) ballots were ASSUMED to be against the Union, this would not have changed the result of the election at all. The fact that the yellow envelopes themselves contained instructions to sign, but only in English, does not change the fact that proper instructions were provided to all prospective voters in both English and Spanish. As aptly stated by Director Sawyer in the Decision, "the instructions to sign the ballot return envelopes was provided to the voters in Spanish in two documents" (p. 8).

In the case cited by Director Sawyer, *Lemco Construction, Inc.*, 283 NLRB 459, 460 (1987), the Board decided to abandon its prior numerical test to determine the validity of a vote and instead held that where there is adequate notice and opportunity to vote and employees are not prevented from voting by the conduct of a party or by unfairness in the scheduling or mechanics of the election then the election is valid notwithstanding low voter participation. The Board addressed this standard in a later case, *The Glass Depot, Inc.*, 318 NLRB 766 (1995), a case involving a determinative number of voters who were unable to vote owing to a snowstorm. In *Glass Depot* the Board held that when faced with having to decide whether an act or unexpected event constitutes "extraordinary circumstances" justifying a new election, it would

examine both the event itself and whether it resulted in less than a representative complement of voters casting ballots. It stated that if the participation rate dropped below 50 percent, a “substantial cause of concern” would exist, if there were an “event” that restricted voting. There is no such “event” here. In *Glass Depot*, since only 4 of the 19 voters had been prevented from voting, the Board upheld the election results, even though the 4 were determinative. In the instant case, there are no extraordinary circumstances that would cause substantial concern. The law does not compel any employee to vote or to vote timely.

Finally, the Board has made it clear that it has no policy requiring the use of ballots in multiple languages. *Northwest Products, Inc.*, 226 NLRB 653 (1976); *Precise Castings*, 294 NLRB 1164 (1989), *enfd.* 915 F.2d 1160 (7th Cir. 1990), *cert. denied* 499 U.S. 959 (1991). In the instant case, the Board did send bilingual ballots and gave clear instructions how to cast the vote. *See* Decision p. 7 (“Each employee voting by mail received in their voting kit the Form NLRB-4175, Instructions to Eligible Employees Voting by United States Mail, in both English and Spanish.”)

B. No Compelling Reasons to Reconsider the Board’s Elections Rules Exist.

1. The Board Has Previously Rejected Due Process Challenges to the Election Rules.

The Employer requests the overruling of the Representation Case Rules effective April 14, 2015 (“RCR”), alleging that the rules violate the due process laws and freedom of speech rights to employers as provided by the United States Constitution. The Employer presents several facts about unions, the Board, employees and employers that are unsubstantiated, including accusing unions of “half-truths” and the Board of “flaunting” information relating to the decrease in days between petition and election.

The Board has repeatedly rejected due process challenges to the election rules. *See Mercy General Health Partners Amicare Home Care Employer v. SEIU Healthcare Michigan, Service Employees International Union*, 2017 WL 6034114 *1 (October 12, 2017). In *UPS Ground Freight, Inc.*, 365 NLRB No. 113 (slip op. July 27, 2017, page 1, fn1), the Board stated, “[t]he time for extensive policy debate over the provisions of the rule has come and gone - the Board’s rule was lawfully enacted.” This was confirmed by *Associated Builders and Contractors of Texas, Inc. v. NLRB*, 826 F.3d 215, 228-229 (5th Cir. 2016), wherein the court held that the amended RCR rules, including the shortening of the time period between petition and election, was not arbitrary and capricious under the Administrative Procedure Act, since the Board acted rationally and in furtherance of its congressional mandate in adopting the rule, because it identified evidence that elections were being unnecessarily delayed by litigation and that certain rules were outdated due to changes in technology. *See* 5 U.S.C.A. § 706(2); National Labor Relations Act §§ 8, 9, 29 U.S.C.A. §§ 158(c), 159(b), 159(c)(1); 29 C.F.R. §§ 102.62(d), 102.63(a)(1), 102.63(b)(1), 102.64(a), 102.66(b), 102.67(b), 102.67(l). Therefore, these due process arguments presented by the Employer have already been rejected by the Board in previous cases.

As recently stated by Board Chairman John F. Ring: “There are few more important responsibilities entrusted to the NLRB than protecting the freedom of employees to choose, or refrain from choosing, a labor organization to represent them, including by ensuring fair and timely Board-conducted secret ballot elections.” *See* <https://www.nlr.gov/news-outreach/news-story/nlr-proposes-rulemaking-protect-employee-free-choice>. In the instant case, the Employer had ample time to exercise its free speech on these issues-it could have conversed with its employees on any of these issues prior to and after the Union filed its Petition. The Employer had unfettered access to its employees and could disperse information to them at any time. While

discussing working conditions and unions during the height of a campaign and while an election is set to be undertaken is a core NLRA right, *See Teledyne Advanced Materials*, 332 NLRB 539 (2000), *Orval Kent Food Co.*, 278 NLRB 402 (1986), *Liberty House Nursing Homes*, 245 NLRB 1194 (1979), *Altercare of Wadsworth Ctr. For Rehab. & Nursing Care, Inc.*, 355 NLRB 565 (2010), the Employer's ability to discuss such matters is not limited to a campaign or while an election is set to be undertaken. In fact, accepting Employer claim that it needed extra time to educate its works would encourage employers to delay elections at the expenses of workers by simply asserting it has had no ability communicate with its workers at all. Such an argument is nonsensical and prejudicial to the employees to desire to exercise unionization rights.

2. *The election involved fewer than 25 workers, some of whom only the Employer had reasonable access.*

How hard can it be to inform a small number of workers of the Employer's positions? The Employer's Initial Voter List contained only 16 names, hardly a daunting number of individuals to contact. If months are needed to contact and "educate" so few employees, it should be reasonably concluded that the education is more like an anti-union indoctrination. Indeed, given the Employer's extensive time relationship with so few employees, it should reasonably be concluded that it had ample time to reach each employee to express views, interests and opinions.

3. *Region 28's Specific Handling of Cases Under the Election Rules is Not Board Misconduct.*

The Employer makes unsubstantiated claims about Region 28 and Regional Director Overstreet regarding the timeline of elections. However, there is no evidence tending to prove that the lack of a few additional days pre-election would have changed the outcome of the election. Director Sawyer accurately states that "the parties agreed in a Stipulated Election

Agreement that the partial mail-partial manual election would commence on September 27, which was 28 days after the filing of the petition” (p. 3). The very law quoted by the Employer says, “The amendments do not establish any rigid timeline for the conduct of the election itself. Indeed, the Board rejects requests that we set minimum or maximum time limits in which all elections must occur.” RCR, Fed. Red., Vol. 79, No. 240 at 74318 (Dec. 15, 2014). No minimum timeline means just that. The law does not require a certain period of time to pass before an election is held. However, 29 CFR § 102.67(b) provides, “The Regional Director shall schedule the election for the **earliest date** practicable consistent with these Rules.” (Emphasis added.) Regional Director Overstreet operated within the law when setting the election dates. In fact, in its Petition, the Union proposed a manual election be held from 9/24 to 10/1. *See* Decision p. 3 fn 5. Therefore, the election was held beyond what the Union at the request of the Employer.

Director Sawyer was well within the parameters of Section 11394.3 of the NLRB Manual, when she decided that a hearing was not necessary: “The regional director should clearly set forth in the decision or supplemental decision the objective factors demonstrating that the election should or should not be vacated. Where the regional director, having obtained the facts alleged by the parties, concludes that there are no disputed facts or that objections can be resolved without the need to resolve disputed facts; or where the regional director in effect assumes the facts alleged in the objections but concludes as a matter of law that the facts do not present substantial grounds for setting aside the election, a decision or supplemental decision should issue **and no hearing is required**. *NLRB v. Air Control Products of St. Petersburg, Inc.*, 335 F.2d 245 (5th Cir. 1964); *Whitney Museum of American Art*, 636 F.2d 19 (2d Cir. 1980)” (emphasis added).

IV. CONCLUSION

There is no evidence tending to show that any eligible voter was prevented from voting. The Employer's speculation that some facts "may have had a chilling effect" is proof that what the Employer is offering amounts to no more than speculation, as pointed out by Director Sawyer. Lastly, the employer acknowledges that full detailed instructions were provided to all eligible voters, in both English and Spanish. The employer has pointed to no law, regulation, or any standard indicating that any supplemental reminders to sign the back of envelopes must be printed in both languages. The instructions were sufficient. The fact that the reminder (apparently not required by law in the first place) was printed in English only is not proof of any unfairness, let alone significant unfairness of the type that could have affected the outcome of the election.

Dated this 9th day of December, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2019, I served a copy of the foregoing
OPPOSITION TO EMPLOYER'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR OF
REGION 27'S DECISION ON OBJECTIONS TO ELECTION, upon the following:

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A handwritten signature in cursive script, appearing to read "Lisa Davis", is written over a horizontal line.